

**RE: Rule 1-400
10/8/04 Commission Meeting
Open Session Item III.H.**

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]

Sent: Wednesday, September 22, 2004 9:19 PM

To: McCurdy, Lauren

Cc: Difuntorum, Randall; Harry Sondheim; JoElla L. Julien; Edward P. George; Ignazio J. Ruvolo; Kevin Mohr

Subject: RRC - 1-400 - 10/8/04 Meeting Materials

Lauren:

I've attached the meeting materials for the 10/8/04 Meeting. They include:

1. Clean version of Draft 4 of Rule 1-400 (rules 7.1 to 7.5), with endnotes (in WP and PDF)
2. Standards organized by rule, with endnotes (in WP and PDF)
3. Red-line version of Rule 1-400 (rules 7.1 to 7.5), comparing Draft 4 to Draft 3.

Some comments for the next meeting:

1. The rules have been circulated to the drafting committee and they have commented on them. The attached versions reflect their comments.

2. Clean version of Draft 4.

- a. There are five endnotes that raise issues for consideration at the next meeting. Members should focus on the issues raised in those endnotes. I've highlighted a couple of the endnotes below.

- b. Endnote 1 discusses an issue concerning the use of "member" in relation to the Standards. This is a separate issue from the Standards issues, discussed below.

- c. Endnote 3 (The 1-320(B) & 2-200(B) issue). Harry asked the drafting team to consider whether the foregoing rules provisions should be subsumed in rule 7.2(b)(4) or whether they should also be maintained as separate rules. That issue is discussed briefly in endnote 3 to Draft 4 of the rules. The consensus of the drafting team was not to subsume the rules but to keep the concept in both (b)(4) and in separate rules, with reciprocal X-references between the rules.

3. The Standards Issue. OCTC has stated that some of the standards can be eliminated, but that

some should be retained. Commission members should read endnote 1 to the Standards document for an overview of the issues presented. The team's recommendations can be found in the sundry endnotes.

Please include this e-mail as a cover memo to the materials. Thanks much,

Kevin

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CalBar – RRC
Rule 1-400
Communication, Advertising & Solicitation
Model Rule Template – Draft 4
For Discussion at October 8, 2004 Meeting
September 22, 2004

Rule 7.1. Communications Concerning the Availability of Legal Services

- (a) For purposes of this chapter, “communication” means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
 - (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
 - (1) Contains any untrue statement; or
 - (2) Contains any misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public.
- (d) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule.

The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. “Presumption affecting the burden of proof” means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all **members**.¹

Discussion

[1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this rule includes representations about the law.

[2] Rule 7.1 is also intended to prohibit truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.

[4] As used in paragraph (a), “writing” means any writing as defined in the Evidence Code.

[5] The list of communications under (a)(1) – (a)(4) of this rule is not intended to be inclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this rule.

[6] See *also* Rule [1-120X(E)] for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with rule 2-300; and
 - (4) refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.²
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Discussion

[1] [DELETED]

[2] Rule 7.2 permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Rule 7.2 permits advertising by electronic media, including but not limited to television, radio and the Internet. Rule 7.2 permits advertising by television and

radio. *But* see Rule 7.3(a) concerning real-time electronic communications with prospective clients.

[4] Neither rule 7.2 nor rule 7.3 is intended to prohibit communications authorized by law. For example, a lawyer will not be subject to discipline under either rule 7.2 or 7.3 for sending notice at the direction of a court to members of a class in class action litigation. Nor would a lawyer be subject to discipline under this rule for including language authorized by statute in an advertisement.³

Paying Others to Recommend a Lawyer

[5] Notwithstanding rule 1-320(C)'s general prohibition on a lawyer giving or promising anything of value to a representative of a communication medium in return for publicity of the lawyer, subparagraph (b)(1), allows a lawyer to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See [Rule 5.3] for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] Subparagraph (b)(2) is intended to permit a lawyer to pay the usual charges of a legal service plan, such as a group or prepaid legal plan as defined in Business & Professions Code, section 6155(c).⁴ Subparagraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See *also* [rule 1-310X(b)(4)].

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See [Rule 5.3]. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] Subparagraph (b)(4) permits a lawyer to make referrals to another, in return for the undertaking of that person to refer clients to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule [1-

310X(d)]. A lawyer does not violate subparagraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. See *also* Rule 2-200(B). Conflicts of interest created by arrangements made pursuant to subparagraph (b)(4) are governed by Rule [3-310]. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. Rule 7.2 is not intended to restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to Rule 7.2 shall include the name and office address of at least one member of the group responsible for its content. See *also* Business & Professions Code, section 6155, subdivision (h). See *also* Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.⁵

Rule 7.3. Direct Contact with Prospective Clients

- (a) A lawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
 - (3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.
- (c) Every written or, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Discussion

[1] There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written or electronic communications to transmit information from a lawyer to prospective clients, rather than direct in person, telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer, a former client, or one with whom the lawyer has a prior close personal or family relationship, or in situations in which the lawyer is not motivated by pecuniary gain. Consequently, the general prohibition in paragraph(a) and the requirements of paragraph(c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which [1] contains information which is false or misleading within the meaning of Rule 7.1, [2] is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of subparagraph (b)(2), [3] involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of subparagraph (b)(1), or [4] is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of subparagraph (b)(3) is prohibited.

[6] Rule 7.3 is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a *bona fide* group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details

concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications sent in response to requests of potential clients or their representatives. Paragraph (c) is also not intended to apply to general announcements by lawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule [1-120X(A)].

Rule 7.4. Communication of Fields of Practice and Specialization

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that the lawyer is a certified specialist in a particular field of law, unless:
 - (1) the lawyer holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and
 - (2) the name of the certifying organization is clearly identified in the communication.

Rule 7.5. Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) A lawyer may state or imply that the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

Discussion

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

ENDNOTES

1. **RRC Action:** At 8/27/04 Meeting, the chair deferred this issue until the Commission members had had an opportunity to review a clean, substantially final rule as drafted following the votes and discussions at the 8/27/04 Meeting.

In addition, Mary Yen was asked to check with OCTC to see if there were any standards which OCTC would want to keep for the benefit of shifting the burden of proof to the charged member. See 9/2/2004 Yen E-mail re 1-400 Standards & Record-keeping requirements to Russell Weiner et al. See also separate document addressing the Standards issue.

KEM Question: If RRC decides to keep standards, should their applicability be limited to "members" of the State Bar rather than all lawyers? Consider that it is unlikely that another state would impose the same kind of burden-shifting in a disciplinary proceeding against one of that state's lawyers for violating California advertising rules.

2. Rule 7.2(b)(4) contains elements of both 1-320(B) and 2-200(B). In an earlier draft, KEM recommended that both 1-320(B) and 2-200(B) be subsumed in 7.2(b)(4). However, while not expressly addressed at the 7/9/04 Meeting, it appeared from comments made that the RRC's preference is to retain both of those concepts in separate rules and to include a cross-reference to those rules in the Discussion to this rule, and a cross-reference to this rule in those other rules. In other words, keep (b)(4), but also keep 1-320(B) and 2-200(B), with reciprocal cross-references.

Issue: Should the concepts in rule 1-320(B) and 2-200(B) be subsumed in rule 7.2(b)(4)?

Drafting Team Recommendation: Do not subsume the rules in 7.2(b)(4). Keep them as separate rules, and include reciprocal cross-references between those rules and rule 7.2(b)(4).

3. **RRC Action:** At 8/27/04 Meeting, RRC voted 7 to 1 (3 abstentions) to delete Discussion ¶ [4] as it appeared in draft 3 ("Neither Rule 7.2 nor Rule 7.3 is intended to prohibit communications authorized by law, such as notice to members of a class in class action litigation.") By an identical margin, the RRC voted to substitute the following: "Rule 7.3 is not intended to prohibit communications authorized by law."

In addition, Stan Lamport moved to include the following concept in the rule, but there was no second: "if you are sending out notice at direction of court, and content has been approved by court, you cannot be disciplined, and if you include language authorized by rule or statute, then you also cannot be subject to discipline." Although no vote was taken, the Chair requested that language embodying that concept be drafted, but no vote was taken.

Issue: Should Paragraph [4] be retained as drafted by KEM?

KEM Recommendation: Use the ABA's language on class actions or simply state: "Rule 7.3 is not intended to prohibit communications authorized by law." The language I've drafted is too confusing. I have no problem with the first concept: if the court directs you to do something, then you shouldn't be disciplined for following the court's order, at least under rule 7.2 or 7.3. However, if you send a communication in a manner that is intrusive, coercive, etc. (rule 7.3(b)(2)), even if it contains language authorized by statute, you should still be subject to discipline.

Ruvolo Recommendation: Simply delete Discussion ¶ [4].

4. **RRC Action:** No specific action taken, but at 8/27/04 Meeting, consensus agreement that KEM should redraft Discussion ¶ [6] to distinguish between legal service plans and lawyer referral services. KEM added citation to B&P Code § 6155(c), which contains three subdivisions:

- (1) A plan of legal insurance as defined in Section 119.6 of the Insurance Code.
- (2) A group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, public or private corporation, or other entity or person, which meets both

of the following conditions:

- (A) It recommends, furnishes, or pays for legal services to its members or beneficiaries.
- (B) It provides telephone advice or personal consultation.
- (3) A program having as its purpose the referral of clients to attorneys for representation on a pro bono basis.

Issue: Is inclusion of paragraphs (1) and (3) of section 6155(c) over-inclusive for what is intended by paragraph (b)(2) of rule 7.2 and Discussion ¶. [6]?

Note: The drafting team believes it is not over-inclusive.

5. **RRC Action:** At 8/27/04 Meeting, motion to reconsider 7/9/04 vote to remove the retention requirement was not seconded. At same meeting, however, RRC voted 7 to 1 (1 abstention) to cross-reference B&P Code § 6159.1 (Retention of Advertisement), notwithstanding fact that at 7/9/04 Meeting, RRC also voted to recommend the repeal of § 6159.1.

CalBar – RRC
Rule 1-400
Communication, Advertising & Solicitation
California Standards Related to Specific Model Rules
For Discussion at October 8, 2004 Meeting
September 22, 2004

Current Standards Related to Communication Rule (Rule 7.1):¹

- (1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.²
- (2) A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”³
- (5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.⁴
- (14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.⁵
- (15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.⁶

Current Standards Related to Advertising (Rule 7.2):

- ~~(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.⁷~~
- (12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.⁸
- (13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.⁹
- (16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or “yellow pages” section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.¹⁰

Current Standards Related to Direct Contact With Clients (Rule 7.3):

- ~~(3) — A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.¹¹~~
- ~~(4) — A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.¹²~~

Current Standards Related to Rule 7.5 (“Firm Names & Letterheads”):

- (6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.¹³
- ~~(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.¹⁴~~
- ~~(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.¹⁵~~
- ~~(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.¹⁶~~

ENDNOTES

1. The Commission has already voted to keep current rule 1-400(E) as rule 7.1(d) (authorizing the BOG to promulgate Standards). There are four questions left to resolve concerning the Standards: (1) Whether to keep **any** of the current Standards; (2) If RRC keep at least some of the Standards, then must decide **which Standard concepts** to retain; (3) Once RRC decides which Standard concepts to keep, decide whether to retain them as a **Standard** (w/ rebuttable presumption) or as **part of a rule** and/or **Discussion**; (4) Finally, with **which rule** should the retained standard/rule be **associated**, i.e., should all the retained Standards be associated with rule 7.1 on Communications generally, or should they be aligned with the rule to which they are most closely related (e.g., should a standard concerning advertising be associated with rule 7.2)?

As an initial matter, OCTC has requested that certain standards, specifically Standards **1, 2, 5, 6, 12, 13, 14, 15 and 16**, “should be made a part of the rule itself or it will be unlikely that OCTC will be able to prosecute the attorney if the conduct occurs.” See OCTC comment transmitted by 9/14/2004 Mary Yen e-mail to Drafting Team. In the same e-mail, OCTC has also stated that the following Standards can be eliminated because they “simply set forth conduct which is untruthful, deceptive or misleading in and of itself,” and “a violation of the rule can still be shown because the conduct violates the proscriptions in section 1-400(D)(1) - (6) of the rule.” They are Standards **3, 4, 7, 8, 9 and 10**. As we have retained (D)(1)-(6) in the various rules 7.1 to 7.5, we should be able to eliminate those standards. The Drafting team is largely in agreement with OCTC on which Standard concepts to retain, which to eliminate. However, see note 7, *below*.

2. Primarily related to rule 7.2 (Advertising), though also applicable to direct-targeted mailings (rule 7.3) and other solicitations.

No counterpart in Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (1) in rule 7.1 for broader application.

3. Primarily related to rule 7.2 (Advertising), though may also be applicable to direct-targeted mailings (rule 7.3). At present, some of the concepts of this rule can be found in rule 7.1, Discussion ¶. [3].

No counterpart in Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (2) in rule 7.1 for broader application.

4. Related to both rule 7.2 and 7.3.

See proposed rule 7.3(c). Note that rule 7.3(c) is restricted to direct targeted mailings, while Standard (5) is also applicable to mass mailings.

OCTC has requested that this Standard be retained in the rule.

KEM Question: Although Standard (5) also appears to be applicable to mass mailings (not unlike getting a flyer from a local dry-cleaner), are mass mailings really a problem that the rule should “target”? Isn’t the real concern direct targeted mailings? Doesn’t proposed rule 7.3(c) address the most serious concern?

KEM Recommendation: Retain Standard (5) as proposed rule 7.3(c).

5. Primarily related to rule 7.2 (Advertising), though also applicable to direct-targeted mailings (rule 7.3) and other solicitations.

No counterpart in Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (14) in rule 7.1 for broader application.

6. Primarily related to rule 7.2 (Advertising), though also applicable to direct-targeted mailings (rule 7.3) and other solicitations.

No counterpart in Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (15) in rule 7.1 for broader application.

7. Related to rule 7.2 (Advertising).

See proposed rule 7.2(b)(2) and rule 7.2, Discussion paragraphs [6] & [7].

OCTC has proposed eliminating this Standard.

KEM Recommendation: Notwithstanding OCTC's observation that Standard (10) can be removed from the rule, retain Standard (10) as rule 7.2(b)(2), with Discussion ¶¶ [6] & [7] elaborating upon the rule provision. I don't think putting the substance of Standard (10) in the rule (as opposed to keeping it as a Standard that creates a rebuttable presumption) would give OCTC an extra tool for discipline; after all, OCTC has already opined that it will be able to reach the conduct under either the false or misleading rubrics. I do, however, think (b)(2) and the discussion provide valuable guidance to members, not only as to LRS's, but also as to pre-paid legal plans.

8. Related primarily to rule 7.2 (Advertising).

See proposed rule 7.2(c) & Discussion paragraph [9].

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (12) as rule 7.2(c). Between 7.2(c) and Rule 7.2, paragraph [9], the concept in Standard (12) is covered.

9. Related to rule 7.2 (Advertising).

No analogous provision in the Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (13) in rule 7.2.

10. Related primarily to rule 7.2 (Advertising).

No counterpart in the Model Rules.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (12) in rule 7.2.

11. Related to rule 7.3 (Direct Contact with Prospective Clients).

See proposed rule 7.3(b)(2), which is based on current rule 1-400(D)(5).

OCTC has proposed eliminating this Standard.

KEM Recommendation: Do not retain Standard (3).

12. See previous note.

13. Related to rule 7.5.

See proposed rule 7.5(a), second sentence.

OCTC has requested that this Standard be retained in the rule.

KEM Recommendation: Retain Standard (6) as rule 7.5(a).

14. Related to rule 7.5.

See proposed rule 7.5(d), which uses this language (vs. analogous Model Rule language)

OCTC has proposed eliminating this Standard.

KEM Recommendation: Do not retain Standard (7).

15. Related to rule 7.5.

See proposed rule 7.5, Discussion paragraph [2], second sentence.

OCTC has proposed eliminating this Standard.

KEM Recommendation: Do not retain Standard (8).

16. Related to rule 7.5.

See proposed rule 7.5(a), first sentence, which is the closest analog to Standard (9).

OCTC has proposed eliminating this Standard.

KEM Recommendation: Do not retain Standard (9).

CalBar – RRC
Rule 1-400
Communication, Advertising & Solicitation
Model Rule Template – Draft 4
For Discussion at October 8, 2004 Meeting
Red-line Comparing Draft 4 (092204) to Draft 3 (072404)
September 22, 2004

Rule 7.1. Communications Concerning a Member's the Availability of Legal Services

- (a) For purposes of this chapter, “communication” means any message or offer made by or on behalf of a memberlawyer concerning the availability for professional employment of a memberlawyer or a member’slawyer’s law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such memberlawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, ~~or other written document material sent or posted by electronic transmission, or other writing as defined in the Evidence Code~~ describing such memberlawyer or law firm, ~~or lawyers~~; or
 - (3) Any advertisement (regardless of medium) of such memberlawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) ~~Any unsolicited correspondence, electronic transmission, or other writing as defined in the Evidence Code~~ from a memberlawyer or law firm directed to any person or entity.
- (b) A memberlawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
- (1) Contains any untrue statement; or
 - (2) Contains any misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public.

- (d) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Discussion

[1] This Rule governs all communications about a member's the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a member's lawyer's services, statements about them must be truthful. Rule 7.2's The requirement of truthfulness is also applicable to a communication under this rule includes representations in such statements about the law.

[2] Rule 7.1 is also intended to prohibit truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the member's lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the member or the member's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a member's lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the member's lawyer's services or fees with the services or fees of other members lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create avoid creating unjustified expectations or otherwise mislead misleading a prospective client.

[4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.

[5] The listing in paragraph (a) of examples The list of communications that come within the meaning under (a)(1) – (a)(4) of "communication" this rule is not intended to be exhaustive inclusive. For example, a member's lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the member lawyer or the member's lawyer's law firm would also be prohibited under this rule.

[56] See also Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year, and Rule [1-120X(E)] for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a memberlawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A memberlawyer shall not give anything of value to a person for recommending the member'slawyer's services except that a memberlawyer may
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;
 - (3) pay for a law practice in accordance with rule 2-300; and
 - (4) ~~make referrals~~refer clients to another lawyer or non-lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for ~~another~~the other person to refer clients or customers or ~~clients~~ to the memberlawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one memberlawyer or law firm responsible for its content.

Discussion

[1] ~~To assist the public in obtaining legal services, members should be allowed to make known their services not only through reputation but also through advertising. The public's need to know about legal services is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Members must be aware, however, that advertising by them entails the risk of practices that are misleading or overreaching.~~[DELETED]

[2] Rule 7.2 permits public dissemination of information concerning a member'slawyer's name or firm name, address and telephone number; the kinds of services the memberlawyer will undertake; the basis on which the member'slawyer's fees are determined, including prices for specific services and payment and credit arrangements; a member'slawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Rule 7.2 permits advertising by electronic media, including but not limited to television, radio and the Internet. Rule 7.2 permits advertising by television and radio. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income, and can enhance the flow of information about legal services to many sectors of the public. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail or through the web site of a member or the member's law firm is permitted by Rule 7.2. But see Rule 7.3(a) concerning the prohibition against solicitation of a prospective client through a real-time electronic exchange that is not initiated by the communications with prospective clients.

[4] Neither Rule 7.2 nor Rule 7.3 is intended to prohibit communications authorized by law, such as notice. For example, a lawyer will not be subject to discipline under either rule 7.2 or 7.3 for sending notice at the direction of a court to members of a class in class action litigation. Nor would a lawyer be subject to discipline under this rule for including language authorized by statute in an advertisement.

Paying Others to Recommend a Member Lawyer

[5] Notwithstanding rule 1-320(C)'s general prohibition on a member lawyer giving or promising anything of value to a representative of a communication medium in return for publicity of the member lawyer, subparagraph (b)(1), allows a member lawyer to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A member lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See [Rule 5.3] for the duties of members lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] Subparagraph (b)(2) is intended to permit a member lawyer to pay the usual charges of a legal service plan, such as a group or prepaid legal plan as defined in Business & Professions Code, section 6155(c). Subparagraph (b)(2) is also intended to permit a lawyer to pay the usual charges of a qualified member lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California. See Business & Professions Code, section 6155, and rules and regulations pursuant thereto. See also [rule 1-310X(b)(4)].

[7] A member lawyer who accepts assignments or referrals from a legal service plan or referrals from a member lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the member's lawyer's professional obligations. See [Rule 5.3]. Legal service plans and member lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a member lawyer referral service sponsored

by a state agency or bar association. {Nor could the memberlawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.}

[8] Subparagraph (b)(4) permits a memberlawyer to make referrals to another, in return for the undertaking of that person to refer clients ~~or customers~~ to the memberlawyer. Such reciprocal referral arrangements must not interfere with the member'slawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rule [1-310X(d)]. A memberlawyer does not violate subparagraph (b)(4) of this Rule by agreeing to refer clients or customers to another, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. See *also* Rule 2-200(B). Conflicts of interest created by arrangements made pursuant to subparagraph (b)(4) are governed by Rule [3-310]. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. Rule 7.2 is not intended to restrict referrals or divisions of revenues or net income among memberslawyers within firms comprised of multiple entities.

Required information in advertisements

[9] Paragraph (c) also applies to a group of lawyers that engages in cooperative advertising. Any such communication made pursuant to Rule 7.2 shall include the name and office address of at least one member of the group responsible for its content. See *also* Business & Professions Code, section 6155, subdivision (h). See *also* Business & Professions Code, section 6159.1, concerning the requirement to retain any advertisement for one year.

Rule 7.3. Direct Contact with Prospective Clients

- (a) A memberlawyer shall not by in person, telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the member'slawyer's doing so is the member'slawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or the person contacted:
- (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the memberlawyer.
- (b) A memberlawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the memberlawyer a desire not to be solicited by the memberlawyer; or
 - (2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or
 - (3) the person to whom the solicitation is directed is known to the lawyer to be represented by counsel in a matter which is a subject of the communication.
- (c) Every written or, recorded or electronic communication from a memberlawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising" Advertising Material" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.
- (d) Notwithstanding the prohibitions in paragraph (a), a memberlawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the memberlawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Discussion

- [1] There is a potential for abuse inherent in direct in person, telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services.

These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over reaching.

[2] This potential for abuse inherent in direct in person, telephone or real-time electronic ~~solicitation of prospective clients justifies its prohibition, particularly since member~~lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written or electronic communications to transmit information from ~~member~~lawyer to prospective clients, rather than direct in person, telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the ~~member~~lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.

[4] There is far less likelihood that abuse will occur when the person contacted is a lawyer, a former client, or one with whom the ~~member~~lawyer has a prior close personal or family relationship, or in situations in which the ~~member~~lawyer is not motivated by pecuniary gain. Consequently, the general prohibition in paragraph(a) and the requirements of paragraph(c) are not applicable in those situations.

[5] ~~Even permitted forms of solicitation can be abused. Thus, any solicitation which [1] contains information which is false or misleading within the meaning of Rule 7.1, which [2] is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct within the meaning of subparagraph (b)(2), or which [3] involves contact with a prospective client who has made known to the member~~lawyer ~~a desire not to be solicited by the member~~lawyer ~~within the meaning of subparagraph (b)(1), or [4] is directed to a person whom the lawyer knows is represented by counsel in a matter which is a subject of the communication within the meaning of subparagraph (b)(3) is prohibited.~~

[6] Rule 7.3 is not intended to prohibit a ~~member~~lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the ~~member~~lawyer or ~~member's~~lawyer's firm is willing to offer.

[7] The requirement in paragraph (c) that certain communications be marked "Advertising Material" or with words of similar import does not apply to communications ~~sent in response to requests of potential clients or their spokespersons or~~

sponsorsrepresentatives. Paragraph (c) is also not intended to apply to general announcements by memberslawyers, including but not limited to changes in personnel or office location, nor does it apply where it is apparent from the context that the communication is an advertisement.

[8] Paragraph (d) of this Rule permits a memberlawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any memberlawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any memberlawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a memberlawyer to create an organization controlled directly or indirectly by the memberlawyer and use the organization for the in person or telephone solicitation of legal employment of the memberlawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. MembersLawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule [1-120X(A)].

Rule 7.4. Communication of Fields of Practice and Specialization

- (a) A ~~member~~lawyer may communicate the fact that ~~he or she~~the lawyer does or does not practice in particular fields of law. A ~~member~~lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A ~~member~~lawyer registered to practice patent law before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (c) A ~~member~~lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A ~~member~~lawyer shall not state or imply that ~~he or she~~the lawyer is a certified specialist in a particular field of law, unless:
 - (1) the ~~member~~lawyer holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and
 - (2) the name of the certifying organization is clearly identified in the communication.

Discussion

~~[1]—Paragraph (a) permits a member to indicate areas of practice in communications about the member's services. If a member practices only in certain fields, or will not accept matters except in a specified field or fields, the member is permitted to so indicate. All such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a member's services.~~

~~[2]—Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of members registered to practice before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3]—Paragraph (d) permits a member to state that the member is a certified specialist in a field of law if member holds a current specialist certificate issued by the Board of Legal Specialization or any other entity accredited by the State Bar. The name of the certifying organization must be included in any communication regarding the certification to insure that consumers can obtain access to useful information about the certifying organization.~~

Rule 7.5. Firm Names and Letterheads

- (a) A memberlawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a memberlawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a memberlawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the memberlawyer is not actively and regularly practicing with the firm.
- (d) A memberlawyer may state or imply that the memberlawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

Discussion

[1] A firm may be designated by the names of all or some of its memberslawyers, by the names of deceased memberslawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A memberlawyer may state or imply that the memberlawyer or member'slawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.